The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON,

Plaintiff,

v.

ALDERWOOD SURGICAL CENTER, LLC, a Washington limited liability company; NORTHWEST NASAL SINUS CENTER, P.S., a Washington professional service corporation, and JAVAD A. SAJAN, M.D.,

Defendants.

NO. 2:22-cv-01835-RSM

STATE'S MOTION TO STRIKE AFFIRMATIVE DEFENSES AND DAMAGES REQUEST UNDER SECTION 1983

NOTE ON MOTION CALENDAR:
Friday, March 17, 2023

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I. INTRODUCTION

Plaintiff State of Washington brought this action because of Defendants' unlawful, unfair, and deceptive business practices that violate state consumer protection law and federal consumer protection and health privacy laws. Defendants answered with a litany of irrelevant and deficient affirmative defenses and asked the Court to grant them relief under 42 U.S.C. § 1983, despite not bringing any claim under that statute. The State respectfully asks the Court to strike Defendants' legally deficient defenses and their frivolous request for relief under § 1983.

The State brings its claims under the Consumer Review Fairness Act, 15 U.S.C. § 45b (CRFA), the Health Insurance Portability and Accountability Act, 42 U.S.C. § 1320d-5(d) and 45 C.F.R. § 164.508(b)(4) (HIPAA), and the Washington Consumer Protection Act, Wash. Rev. Code § 19.86 (CPA). Dkt. #1. Defendants engaged in numerous unlawful, unfair, and deceptive business practices over many years, including: (1) using illegal form non-disclosure agreements (NDAs) to restrict patients from posting negative online reviews; (2) misleading patients into believing the illegal NDAs were valid and enforceable, or creating that deceptive net impression; (3) advertising a $100 consultation fee unconditionally and collecting payment from patients before disclosing they must sign illegal NDAs as a condition of receiving services; (4) using the illegal NDAs, threats, and bribes to coerce patients into removing negative reviews once posted; (5) creating and posting fake positive reviews using fake email accounts and fictional online personas; (6) manufacturing and posting tens of thousands of fake "followers" and thousands of fake "likes" on social media; (7) creating and displaying digitally altered "before and after" photos; and (8) misappropriating cash rebates earned by their patients under a customer loyalty program. Dkt. #1 at pp. 9-26.

In their Answer, Defendants asserted twenty-eight (28) affirmative defenses, Dkt. #10 at pp. 26-28, and asked the Court to "issue Defendants compensatory and punitive damages under 42 U.S.C. § 1983 for violation of Defendants' due process rights under the Fifth and Fifteenth [*sic*] Amendments and Section 3 of the Washington Constitution." Dkt. #10 at p. 29 (Prayer for

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Relief, para. iii). As discussed below, many of these affirmative defenses and Defendants' request for damages under § 1983 do not meet minimum requirements of notice pleading and should be stricken on that ground. Further, because most, if not all, of these defenses and the request for damages under § 1983 could not succeed under any circumstances, they should be stricken with prejudice, without leave to re-plead.

II. ARGUMENT

A. Legal Standards

Rule 12(f) permits the Court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). The purpose of the rule "is to avoid the expenditure of time and money that must arise from litigating spurious issues." *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010). An affirmative defense may be insufficient "as a matter of pleading or as a matter of law." *Seattlehaunts, LLC v. Thomas Family Farm, LLC*, No. C19-1937 JLR, 2020 WL 5500373, at *4 (W.D. Wash. Sept. 11, 2020).

An affirmative defense is insufficiently pled if it fails to give "fair notice" of the defense. "Fair notice requires the defendant to state the nature and grounds for each affirmative defense." *Opico v. Convergent Outsourcing, Inc.*, No. C18-1579 RSL, 2019 WL 1755312, at *1 (W.D. Wash. Apr. 19, 2019); *see also* Fed. R. Civ. P. 8(b)(1)(A) (a party must "state in short and plain terms its defenses to each claim asserted against it"). Although an affirmative defense is not required to meet the *Iqbal/Twombly* standard, it "must be supported by at least some facts indicating the grounds on which the defense is based." *Grande v. U.S. Bank Nat'l Ass'n*, No. C19-333 MJP, 2020 WL 2063663, at *2 (W.D. Wash. Apr. 29, 2020); *Smith v. Bank of New York Mellon*, No. C19-0538 JCC, 2019 WL 3428744, at *1 (W.D. Wash. July 30, 2019) (same).

An affirmative defense is legally deficient and should be stricken with prejudice if it cannot succeed under any circumstances. *See, e.g.*, *MacLay v. M/V Sahara*, 926 F. Supp. 2d 1209, 1217 (W.D. Wash. 2013) ("[I]f the affirmative defense fails to state a

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claim upon which relief can be granted, it shall be dismissed."); *FTC v. Stefanchik*, No. C04-1852 RSM, 2004 WL 5495267, at *1 (W.D. Wash. Nov. 12, 2004) (defense is legally deficient "if it cannot succeed under any circumstances"). In making its determination, the Court should "assume that the plaintiff can prove its factual allegations" and "treat as admitted all material factual allegations underlying the challenged defenses." *FTC v. Stefanchik*, 2004 WL 5495267 at *2.

B. Mootness (Affirmative Defense 3)

Defendants' mootness defense, Dkt. #10 at p. 26, is both improperly pled and legally deficient because Defendants have not pled any facts to support it and the defense could not succeed under any circumstances. Even if or to the extent Defendants contend they ceased their illegal, unfair, and deceptive conduct after it was discovered, such cessation would not moot the State's claims because adjudication is necessary to obtain effective relief, namely, declaratory and injunctive relief, restitution, civil penalties, attorney's fees and costs. *See Bell v. City of Boise*, 709 F.3d 890, 898 (9th Cir. 2013) (cessation of unlawful practice does not deprive court of power to determine legality of practice); *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wash. 2d 298, 312, 553 P.2d 423 (1976) ("Cessation of illegal conduct does not deprive a tribunal of the power to hear and determine the case; *i.e.*, it does not render the case moot. A court may need to settle an existing controversy over the legality of the challenged practices.").

C. Wash. Rev. Code § 19.86.170 (Affirmative Defense 10)

Defendants' tenth affirmative defense asserts that "[t]he alleged action or transaction is exempted under RCW 19.86.170." Dkt. #10 at p. 27. This defense is insufficiently pled because Defendants alleged no facts to support it, and also fails as a matter of law. Based on Defendants' allegations in their twelfth affirmative defense relating to the Washington Medical Commission

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(WMC),[1] it appears that Defendants contend that if the WMC failed to specifically *prohibit* Defendants' advertising practices, the WMC's *inaction* supports a defense under the exemption provision in Wash. Rev. Code § 19.86.170. There is no basis for such an exemption defense in this case, and it should be stricken as a matter of law.

Wash. Rev. Code § 19.86.170 provides that "[n]othing in this chapter shall apply to transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington utilities and transportation commission, the federal power commission *or actions or transactions* ***permitted*** *by any other regulatory body or officer acting under statutory authority of this state or the United States*." Wash. Rev. Code § 19.86.170 (emphasis added). As an exception to the CPA, this exemption provision is subject to the Legislature's directive that the CPA must "be liberally construed," Wash. Rev. Code § 19.86.920, and any exceptions must be "narrowly confined." *Vogt v. Seattle-First Nat. Bank,* 117 Wash. 2d 541, 552, 817 P.2d 1364 (1991).

Under Wash. Rev. Code § 19.86.170, "an action or transaction is not exempt merely because it is regulated generally, or merely because a regulating agency acquiesces in it." *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wash. App. 834, 844, 942 P.2d 1072 (1997). Rather, "the agency must take '*overt affirmative action specifically to permit* the actions or transactions engaged in' by the person or entity involved in a Consumer Protection Act complaint." *Id.* (emphasis added) (quoting *Vogt*, 117 Wash. 2d at 552). The WMC has legal authority to discipline a physician for unprofessional conduct, including "advertising which is false, fraudulent, or misleading," Wash. Rev. Code § 18.130.180(3), but it has no legal authority to take *overt affirmative action specifically to permit* a physician to engage in specific advertising practices, or any other challenged practices at issue here. *See* Wash. Rev. Code § 18.130.050

[1] *See* Defendants' Twelfth Affirmative Defense, Dkt. No. 10 at p. 27 (alleging that "Defendants reasonably relied to their detriment on the guidance by the State of Washington by and through the Washington Medical Commission.").

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(entitled "Authority of disciplining authority," confirming that WMC has no such authority). Because Defendants have not alleged—and indeed cannot—that WMC took "*overt affirmative action specifically to permit*" them to engage in the unlawful, unfair, and deceptive practices at issue, Wash. Rev. Code § 19.86.170 does not apply and this defense fails as a matter of law.

D. Estoppel, Unclean Hands, Waiver & Laches (Affirmative Defenses 12, 13, 15 & 16)

Defendants' twelfth, thirteenth, fifteenth, and sixteenth affirmative defenses assert that the State's claims are barred by the equitable doctrines of estoppel, unclean hands, waiver, and laches. Dkt. #10 at p. 27. Defendants' threadbare assertions of these equitable defenses do not meet the notice pleading requirements of Rule 8, much less the heightened pleading requirements that apply to equitable defenses asserted against the government. As a general rule, equitable defenses cannot be asserted against the government in a civil action brought to protect the public interest, and should be stricken as a matter of law. *See, e.g.*, *FTC v. Debt Solutions, Inc.*, No. C06-298 JLR, 2006 WL 2257022, at *1 (W.D. Wash. Aug. 7, 2006) (striking equitable defenses, stating "[a]s to the equitable defenses of estoppel, waiver, unclean hands, and laches, the FTC correctly notes that equitable defenses are unavailable to a party seeking to avoid a governmental entity's exercise of statutory power"); *State of Washington v. GEO Group, Inc.*, No. C17-5806 RJB, 2019 WL 2084463, at * 3 (W.D. Wash. May 13, 2019) (same, stating, "[g]enerally, equitable defenses may not be asserted against governmental entities if their application would interfere with the proper exercise of governmental duties") (citing Washington case law).

Defendants assert that they "reasonably relied on the guidance by the State of Washington by and through the Washington Medical Commission." Dkt. #10 at p. 27. But this assertion gets them nowhere. To establish an equitable estoppel defense, Defendants must allege and establish not only each of the elements of estoppel, but "affirmative misconduct" by the State. *See, e.g.*, *United States v. Ruby Co.*, 588 F.2d 697, 703 (9th Cir. 1978); *FTC v. Consumer Defense, LLC*, No. C18-30 JCM, 2019 WL 266287, at *5 (D. Nev. Jan. 18, 2019) (same);

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FTC v. American Tax Relief, LLC, No. CV 11-6397 DSF, 2011 WL 13135578, at *1-2 (C.D. Cal. Oct. 19, 2011) (same); *FTC v. Commerce Planet, Inc.*, No. CV 09-01324 CJC, 2010 WL 11673795, at *2 (C.D. Cal. July 6, 2010) (same); *see also Mercer Island v. Steinmann*, 9 Wash. App. 479, 481, 513 P.2d 80 (1973) (equitable estoppel may not be applied against a governmental entity if doing so would interfere with the discharge of its duties).

Defendants have not alleged "affirmative misconduct" by the State that would meet this heightened standard for asserting equitable defenses against the government, and there is no basis for them to do so. As discussed above, the WMC, by its very nature, does not issue "guidance" to the medical community and has no authority under Washington law to authorize the unlawful, unfair, and deceptive conduct at issue. Thus, Defendants' equitable estoppel defense cannot succeed under any circumstances, and the Court should dismiss it with prejudice.

Similarly, to establish an unclean hands defense, Defendants must allege and establish conduct by the government that is "so outrageous it rises to a constitutional level." *See FTC v. Commerce Planet, Inc.*, 2010 WL 11673795, at *3 (striking unclean hands defense based on failure to allege conduct "so outrageous that it rises to a constitutional level"); *see also FTC v. American Tax Relief, LLC*, No. CV 11-6397 DSF, 2011 WL 13135578, at *1 (C.D. Cal. Oct. 19, 2011) (striking unclean hands defense based on defendants' failure to "allege that the FTC engaged in any 'affirmative misconduct going beyond mere negligence'"); *United States v. Philip Morris, Inc.*, 300 F. Supp. 2d 61, 75 (D.D.C. 2004) ("When, as here, the Government acts in the public interest the unclean hands doctrine is unavailable as a matter of law."). Defendants assert that "Plaintiff has unclean hands and has committed wrongdoing," Dkt. #10 at p. 27, without alleging any facts (because there are none) that could possibly meet this exacting standard.

Defendants' waiver defense should be stricken for the same reasons. Defendants fail to describe any action the State took to "waive" its claims. *See, e.g.*, *FTC v. Golden Empire Mortg., Inc.*, No. CV 09-3227 CAS, 2009 WL 4798874, at *3 (C.D. Cal. Dec. 10, 2009) (striking

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waiver defense: "merely making a vague reference to a doctrine, without more, does not provide a fair defense"); *United States v. Iron Mountain Mines, Inc.*, 812 F. Supp. 1528, 1546 (E.D. Cal. 1992) (same, stating "waiver, estoppel, and unclean hands . . . may not be asserted against sovereigns who act to protect the public welfare").

Finally, Defendants have not alleged, nor is there any basis to allege, that the State engaged in "affirmative misconduct" that would support a laches defense. *See FTC v. Consumer Defense, LLC*, 2019 WL 266287, at *5 (striking laches defense, stating "[l]aches is not available against the federal government when it undertakes an action to enforce a public right or to protect the public interest"). Defendants' laches defense is also barred under Wash. Rev. Code § 4.16.160, which states "there shall be no limitation to actions brought in the name or for the benefit of the state, and *no claim of right predicated upon the lapse of time shall ever be asserted against the state,* including actions asserting a claim for civil penalties under RCW 19.86.140." Wash. Rev. Code § 4.16.160 (emphasis added).

E. Statute of Limitations (Affirmative Defense 14)

Defendants' fourteenth affirmative defense states that "This action is barred, in whole or in part, by the applicable statute of limitations." Dkt. #10 at p. 27. Although the State has sued Defendants under three statutes (the CRFA, HIPAA, and the CPA), Defendants have not identified any applicable statute of limitations, and their barebones defense is improperly pled. *See Tollefson v. Aurora Financial Group, Inc.*, No. C20-0297 JLR, 2021 WL 462689, at *3 (W.D. Wash. Feb. 9, 2021) (striking statute of limitations defense for failing to identify any applicable statute, stating "Defendants' statute of limitations defense, as pleaded, does not provide Ms. Tollefson with notice as to which statute(s) of limitations might apply"); *Seattlehaunts LLC*, 2020 WL 5500373, at *9 (same); *Smith v. Bank of New York Mellon*, No. C19-0538 JCC, 2019 WL 3428744, at *2 (W.D. Wash. July 30, 2019) (same, stating "[t]his boilerplate assertion does not give Plaintiff fair notice because it does not state the applicable statute of limitations or which of Plaintiff's claims are barred").

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There is no statute of limitations that bars any of the State's claims for relief. With respect to the CPA claims, Wash. Rev. Code § 4.16.160 is dispositive. *See also State of Washington v. LG Electronics, Inc*., 186 Wash. 2d 1, 12, 375 P.3d 636 (2016) (noting that "[a]t common law, statutes of limitations did not run against the State" and that this common law *nullum tempus* doctrine is codified in Wash. Rev. Code § 4.16.160).

With respect to the HIPAA claim, while there is a six-year statute of limitations for civil penalties, *see* 42 U.S.C. § 1320-7a(c)(1), the reach-back period extends to December 29, 2016 (six years before date of filing), which pre-dates all of the alleged HIPAA violations in this case. *See* 42 U.S.C. § 1320-d-7a(c)(1) (six-year statute of limitations); 42 U.S.C. § 1320-d-5(d)(1), (d)(8) (authorizing the State to enforce HIPAA subject to six-year statute of limitations, cross-referencing § 1320-d-7a(c)(1)).

Finally, with respect to the CRFA claims, although most civil penalty claims under the FTC Act are subject to a five-year statute of limitations, *see* 28 U.S.C. § 2462, the State does not seek *penalties* under the CRFA. *See FTC v. Pukke*, 53 F.4th 80, 108 (4th Cir. 2022) (holding there is no statute of limitations under FTC Act for injunctive relief); *FTC v. J. William Enterprises, LLC*, 283 F. Supp. 3d 1259, 1261-62 (M.D. Fla. 2017) (same). There is no statute of limitations governing the State's claim for *injunctive relief* under the CRFA.

F. Adequate Remedy at Law (Affirmative Defense 24)

In their twenty-fourth affirmative defense, Defendants assert that "Plaintiff is not entitled to injunctive or other equitable relief because to the extent Plaintiff could prove its claims . . . Plaintiff has an adequate remedy at law and any injunctive relief would be improper." Dkt. #10 at p. 28. The State, however, seeks enumerated statutorily-created remedies under the CRFA, HIPAA, and the CPA, including injunctive relief. *See* 15 U.S.C. § 45b(e)(1) (injunctive relief under the CRFA); 42 U.S.C. § 1320d-5(d)(1)(A) (injunctive relief under HIPAA); Wash. Rev. Code § 19.86.080(1) (injunctive relief under the CPA). The fact that the State may also be awarded civil penalties and other legal remedies for Defendants' violations of these

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statutes does not preclude injunctive relief, and this defense should therefore be stricken as a matter of law. *See FTC v. Hang-Ups Art Enterprises, Inc.*, No. CV 95-0027 RMT, 1995 WL 914179, at *4 (C.D. Cal. Sept. 27, 1995) (striking adequate remedy at law defense because existence of legal remedies "does not bar the FTC from seeking equitable relief under the FTC Act" and "to find otherwise would nullify much of the FTC Act").

G. Due Process (Affirmative Defenses 25, 26 & 27)

Defendants' twenty-fifth, twenty-sixth, and twenty-seventh affirmative defenses assert that the State's claims are barred to the extent they violate Defendants' due process rights. *See* Dkt. #10 at p. 28. Defendants base these due process defenses on conclusory allegations that the State seeks "improper multiple damage awards, and damage awards duplicative of those sought in other actions" (twenty-fifth defense), "failed to recuse an individual with a clear conflict of interest from the AGO investigation team" (twenty-sixth defense), and "failed to permit Defendants an opportunity to address Plaintiff's accusations prior to filing and publicizing an investigation and lawsuit" (twenty-seventh defense), allegedly in violation of "Due Process Guarantees under the Fifth and Fourteenth Amendment[s] of the United States Constitution" and "Section 3 of the Washington Constitution." *Id.*

Again, Defendants have not articulated factual grounds for any of these defenses sufficient to meet the pleading requirements of Rule 8. To the extent they claim the State deprived them of procedural due process by failing to give prior notice of Plaintiff's investigative findings (twenty-seventh defense), the defense has no basis because Defendants have no constitutional right to prior notice of the State's findings, and this judicial proceeding will satisfy due process by giving Defendants a full and fair opportunity to challenge the State's evidence and to be heard in response to the State's claims.

To the extent Defendants claim the State's request for penalties under multiple statutes seeks unconstitutionally duplicative damage awards (twenty-fifth defense), Defendants are again mistaken. The State brings the claims for which it seeks penalties pursuant to, and consistent

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with, its statutory authority under HIPAA and the CPA, and it is entitled to seek separate penalties under both of those statutes.[2] The Court may ultimately determine that Defendants violated the CPA by requiring patients to sign an NDA agreeing "not [to] leave a negative review or say anything that would hurt the reputation of the practice," *see* Complaint, Dkt. #1 at pp. 9-10 & Ex. A, and also violated HIPAA by requiring patients to agree, in the same NDA, that "[i]f I leave a negative review without contacting a representative of the practice and allowing them to resolve the issue, I give permission and allow a response [to the review] from the practice with my personal health information and agree to pay a $250,000 fine." *Id.* Because these penalties arise under two different statutes and constitute separate statutory violations, it is not unconstitutionally duplicative to impose penalties under both statutes.

Finally, with respect to Defendants' claim that the State violated their due process rights by "fail[ing] to recuse an individual with a clear conflict of interest from the AGO investigation team" (twenty-sixth defense), the defense is ludicrous. To the extent that the basis for this alleged defense is that a member of the AGO's investigation team received a single skincare treatment from one of the Defendant entities long before the State began investigating this matter, the defense is patently deficient. Employees of the Attorney General's Office are also consumers, and such a fact would not require recusal under any circumstances, much less support a due process defense. Defendants have not alleged, nor could they, any violation of a "fundamental" interest that is so vital that "neither liberty nor justice would exist if [it] were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citation omitted); *see also FTC v. Meta Platforms, Inc.*, No. 5:22-cv-04325 EJD, 2022 WL 16637996, at *7 (N.D. Cal. Nov. 2, 2022) (striking Meta's bias-related affirmative defenses with prejudice, finding that "Meta's bias-related defenses 'do not pertain, and are not necessary, to the issues in question'") (citation omitted); *FTC v. Facebook, Inc.*, 581 F. Supp. 3d 34, 64 (D.D.C. 2022) (rejecting argument that

[2] As noted in Section II. E., above, the State does not seek penalties under the CRFA.

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FTC's Chair Lina Khan was required to recuse herself from an investigation of Facebook based on a purported conflict of interest, stating, "[a]lthough Khan has undoubtedly expressed views of Facebook's monopoly power, these views do not suggest the type of 'axe to grind' based on personal animosity or financial conflict of interest that has disqualified prosecutors in the past").

H. Request for Damages under 42 U.S.C. § 1983

Finally, Defendants' request in their Prayer for Relief asking the Court to "issue Defendants compensatory and punitive damages under 42 U.S.C. § 1983," Dkt. #10 at p. 29, is utterly unfounded. Section 1983 allows an individual to sue a state official in their personal capacity where they violated the claimant's federal civil rights acting under color of state law. *See* 42 U.S.C. § 1983. As a threshold matter, Defendants provide no basis for bringing an affirmative *defense* under § 1983, which instead provides the basis for bringing "an action at law, suit in equity, or other proper proceeding for redress." *Id*.

But the problems with Defendants' request for § 1983 relief go even deeper, as no § 1983 claim can lie against the State. *See Howlett v. Rose*, 496 U.S. 356, 365 (1990) ("[T]he State and arms of [the] State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under § 1983 in either federal court or state court."); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 64 (1989) ("a State is not a person within the meaning of § 1983"); *Garnica v. Washington Dept. of Corrections*, 965 F. Supp. 2d 1250, 1276 (W.D. Wash. 2013) (same, citing *Howlett*). Defendants have not alleged that an individual acting "under color of state law" violated their civil rights, and there are no individual plaintiffs in this case against whom such allegations could be made. Thus, Defendants' request for relief under § 1983 should be stricken with prejudice.

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III. CONCLUSION

Defendants' affirmative defenses discussed above and their request for compensatory and punitive damages under 42 U.S.C. § 1983 are improperly pled, legally deficient, and should be stricken with prejudice.

DATED this 2nd day of March, 2023.

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Attorney General

/s/ *Matthew Geyman*
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I certify that this memorandum contains 3,889 words, in compliance with the Local Civil Rules.

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CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing to be served on all counsel of record via the ECF system.

I certify, under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 2nd day of March, 2023, at Seattle, Washington.

/s/ Matthew Geyman
MATTHEW GEYMAN, WSBA #17544
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